United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

77-1019

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee

-v-

DOMINIQUE ORSINI,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF ANTHONY MARRO AS AMICUS CURIAE

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Anthony Marro submits this brief as amicus curiae in support of the United States' position that the District Court did not err in quashing the subpoena duces tecum issued to him as a reporter for Newsweek magazine.[1/] All parties to this action have given their written consent to the filing of this brief. Copies of the letters of consent have been filed with the Clerk as appendices to this brief.

QUESTIONS PRESENTED

1. Whether the District Court erred in concluding that the information sought by the subpoena issued to Mr. Marro was immaterial and irrelevant to the defendant's claim for relief under United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

2. Whether the District Court erred in concluding that the information sought by the subpoena -- namely, a reporter's confidential sources -- was protected from compulsory disclosure by the First Amendment.

3. Whether the information sought by the subpoena is privileged as a matter of federal common law.

INTEREST OF THE AMICUS

Anthony Marro was, at all times relevant to this case, a reporter for Newsweek magazine. For four years he specialized

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1/ Subsequent to the District Court proceedings, Mr. Marro became a reporter for the New York Times.

in reporting on drug enforcement and related matters. In the course of his newsgathering on these matters, Mr. Marro often obtained information important to the public interest from federal officials and others only under a pledge that he would protect their identities from disclosure.

During the pretrial proceedings in this case, the defendant, Dominique Orsini, secured the issuance of a subpoena duces tecum seeking to compel Mr. Marro to disclose the identities of confidential sources who had provided certain information contained in an article published in Newsweek on August 16, 1976. Mr. Marro moved to quash the subpoena on the ground, inter alia, that the identities of his confidential sources were protected from compulsory disclosure by the First Amendment guarantee of a free press. The District Court sustained Marro's position and quashed the subpoena.

Defendant, having pleaded guilty to conspiracy to violate the narcotics laws, appeals from the judgment of conviction on the ground, inter alia, that the District Court committed error in granting Mr. Marro's motion to quash the subpoena. Mr. Marro's interest in preserving the confidentiality of his sources, which stems from his continuing interest in effective newsgathering and finds its roots in the First Amendment's free press guarantee, is thus directly implicated in this appeal.

STATEMENT

Prior to his plea of guilty in this case, the defendant, Dominique Orsini, moved to dismiss the indictment on the ground that his presence within the jurisdiction had been secured through the use of cruel and inhuman conduct. See United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975); United States v. Lira, 515 F.2d 68 (2d Cir. 1975). Defendant alleged that he had been unlawfully kidnapped, beaten, and drugged by agents of the United States in Dakar, Senegal. The District Court noted that the defendant's allegations, if substantiated, would entitle him to relief under Toscanino, supra, and its progeny. United States v. Orsini, 402 F. Supp. 1218, 1219 (E.D.N.Y. 1975). Accordingly, it conducted an extensive evidentiary hearing to determine the validity of the defendant's allegations.

In the course of the Toscanino hearing before the District Court, the defendant secured the issuance of a subpoena directed to Anthony Marro, a reporter for Newsweek magazine. The subpoena sought to compel Mr. Marro to disclose the identities of confidential sources who had provided information contained in a two-page news article published in Newsweek on August 16, 1976. The article concerned the methods used by the Drug Enforcement Administration to obtain custody of suspected drug dealers located outside the United States for the purpose of returning

them to the United States for trial. The sole mention of defendant Orsini in the two-page article was a single reference to the fact that he "was abducted from Senegal." The article did not discuss in any way the treatment Orsini received in Senegal or elsewhere, or the means by which federal agents obtained custody of him. And the subpoena issued at Orsini's application did not seek information concerning these matters; it sought documents and testimony concerning the identities of the following officials referred to in the article:

> (1) "'U.S. officials [who] privately tell the story' of how the Government of Paraguay was threatened with the loss of American aid unless it extradited one Auguste Ricord" and
>
> (2) "'one Federal official' who said 'Clearly, we have paid for some of these people. It might not have been a specific quid pro quo, but we would give X dollars or X cases of ammunition to officials who helped get these people on planes.[']".

Mr. Marro moved to quash the subpoena issued to him on three grounds: (1) that the information sought was immaterial and irrelevant to the Toscanino hearing; (2) that the information was privileged under Section 79-H of the Civil Rights Law of New York and Article 1, § 8 of the New York Constitution, as incorporated into federal common law; and (3) that the information was privileged under the First Amendment. In an affidavit accompanying his Motion to Quash, Mr. Marro stated that the sources of the two statements in question were confidential sources who had given

information to Mr. Marro in the course of his newsgathering for the August 16th article and previous articles. Before the sources would supply information to Mr. Marro they demanded that he promise to keep their identities confidential, and Mr. Marro explicitly gave that promise. Affidavit, ¶ 6. Neither of the sources ever discussed with Mr. Marro any aspect of the means used by agents of the United States to obtain custody of the defendant and return him to the United States, nor did they ever discuss the use of any physical force against the defendant. Affidavit, ¶ 7.

The District Court quashed the subpoena "on the grounds of irrelevancy and immateriality, as well as upon the grounds of First Amendment protection."[2/] United States v. Orsini, 424 F. Supp. 229, 232 (E.D.N.Y. 1976). Subsequently, the Court denied the defendant's motion to dismiss the indictment, concluding, inter alia, that "Mr. Orsini was neither tortured nor subjected to inhumane treatment by anyone, whether American, Senegalese, or other foreign national agents." Id. at 232, 235.

2/ The District Court found it unnecessary to consider Mr. Marro's claim that the identities of his confidential sources were privileged as a matter of federal common law.

ARGUMENT

I. THE INFORMATION SOUGHT BY THE SUBPOENA WAS IMMATERIAL AND IRRELEVANT TO THE ISSUES PRESENTED IN THE TOSCANINO HEARING.

The issue before the District Court in the pretrial hearing was whether the defendant's presence in the jurisdiction was secured "through use of cruel and inhuman conduct amounting to a patent violation of due process principles." United States v. Lira, 515 F.2d at 70. The essential finding under Toscanino and its progeny is one of "cruel, inhuman and outrageous treatment" at the hands of agents of the United States government. United States ex rel. Lujan v. Gengler, 510 F.2d at 65. As the District Court noted in quashing the subpoena in this case: "It is patently clear that the subject matter sought in the subpoena bears no reasonable relationship to the issue of gross mistreatment of Mr. Orsini by or at the direction of American officials." 424 F. Supp. at 231.

The first item of information sought by the subpoena was the identity of "'U.S. officials [who] privately tell the story' of how the Government of Paraguay was threatened with the loss of American aid unless it extradited one Auguste Ricord." As the District Court noted, however, Mr. Orsini was arrested and expelled from Senegal and has no known connection with Auguste Ricord or with the nation of Paraguay. "Information which relates

to communications between the Government of Paraguay and the Government of the United States has absolutely no bearing on the issue of Mr. Orsini's treatment in Senegal." 424 F. Supp. at 231.

The second item of information sought in the subpoena was the identity of "'one Federal official' who said 'Clearly, we have paid for some of these people. It might not have been a specific quid pro quo, but we would give X dollars and X cases of ammunition to officials who helped get these people on planes.[']" As the District Court noted, the statement that is the subject of this second inquiry makes no reference to Mr. Orsini, or to any case in particular. The court further explained:

> "The statement does not even relate to the treatment of persons brought into the United States for trial, but rather it refers to payments made in order to gain the cooperation of foreign governments. Such payments, to secure the return of fugitives to the United States, would not serve as a ground for dismissal of the indictment under the Toscanino Doctrine." 424 F. Supp. at 231.

Mr. Orsini contends tnat the information sought by the subpoena would have assisted him in establishing "that the American government has a general policy of 'reaching' foreign governments to induce them to turn over foreigners wanted on drug charges and/or that this took place in Senegal in Mr. Orsini's case." Brief for Appellant Dominique Orsini, at 11. Whether or not there may have been such a policy as a general matter, however, the District Court expressly found that "no payment of any

kind, whether of money, goods, or services" was made in this case. 424 F. Supp. at 233 (Finding of Fact 4).

There is no basis whatsoever to believe that this finding by the District Court would have been altered by the disclosure of the information sought by the subpoena. The first item identified in the subpoena does not even relate to a bribe. It relates to pressure put on the Government of Paraguay by the Government of the United States. There is no suggestion that any person -- foreign or American -- was corrupted. Nor is there any suggestion that any foreign or American law was violated. Most importantly, as previously noted, the first item relates to the expulsion of Auguste Ricord from Paraguay, not to the expulsion of Dominique Orsini from Senegal.

The second item is too vague to have any bearing on Orsini's case. Somewhere, sometime, someone may have paid something to obtain the return of some defendants to the United States. That statement provides no basis for any inference as to Orsini's case. The irrelevance of the statement is underlined by the fact that the confidential source to whom the statement was attributed never even discussed any payments in connection with Orsini's case. Affidavit of Marro, ¶ 7. Moreover, the very individuals who would have had knowledge of any bribery in this case -- DEA agents and other American officials in Senegal -- testified in the course of the pretrial proceedings. And it was this testimony

upon which the District Court relied in concluding that no payment of any kind had been made.

For the above reasons, the information sought by the subpoena in this case would not have assisted Orsini in establishing that a payment of some kind was made to secure his return to the United States. But even if it is assumed that the information would have assisted him in making such a showing, the subpoena was properly quashed. As the District Court quite properly held, proof of bribery of foreign officials would not have advanced Orsini's claim in the slightest. Only when the defendant has been subjected to "cruel, inhuman and outrageous treatment," United States ex rel. Lujan v. Gengler, 510 F.2d at 65, is he entitled to relief.[3/] Otherwise, as this Court made clear in Lujan, illegalities in the manner in which a defendant is brought into the United States do not affect the court's power to proceed. 510 F.2d at 64-66. In Frisbie v. Collins, 342 U.S. 519 (1952), and Ker v. Illinois, 119 U.S. 436 (1886), the Supreme Court held that the illegal kidnapping of a defendant in order to bring him within the court's jurisdiction

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3/ In a recent case, the 9th Circuit summarized the showing required under Toscanino and its progeny as one of "grossly cruel and unusual barbarities inflicted upon [the defendant] by persons who can be characterized as paid agents of the United States." United States v. Lovato, 520 F.2d 1270, 1271 (9th Cir. 1975).

did not warrant the drastic remedy of nullification of the indictment. And as the District Court reasoned in this case: "It is manifest that if the Constitution tolerates the forcible kidnapping of a defendant to bring him to justice, then it also tolerates the payment of a bribe to obtain custody of a fugitive defendant." 424 F. Supp. at 232. There may well be remedies for the improper use of federal funds, but the freeing of men charged with criminal conduct is not one of them.

Orsini contends that proof of a payment by American officials, if not sufficient by itself to entitle him to relief, would nevertheless assist his claim by establishing a connection between the American government and an alleged beating inflicted upon him by Senegalese officials. Any such payment, he insists, would establish the American government's responsibility for that alleged beating.[4/] The District Court, however, found that the superficial cut suffered by Orsini was the result of a struggle that he initiated with the Senegalese police,[5/] and the Court explicitly discredited Orsini's testimony that excessive force

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4/ This contention is itself without merit, since the District Court expressly found that "if Mr. Orsini was assaulted, . . . American agents or officials had no knowledge of said alleged assault." 424 F. Supp. at 235.

5/ 424 F. Supp. at 234 (Finding of Fact 9). See also id. (Finding of Fact 10).

was used by either American or Senegalese officials.[6] The Court also found that Orsini was treated by Senegalese officials in the same way any other prisoner would have been treated,[7] and concluded that "Mr. Orsini was neither tortured nor subjected to inhumane treatment by anyone, whether American, Senegalese, or other foreign national agents."[8] There was, in short, no "cruel, inhuman and outrageous treatment" at all inflicted upon the defendant. If, therefore, the subpoena was designed simply to provide a connection between the American government and mistreatment by Senegalese officials, the subpoena was pointless.

For the foregoing reasons, the District Court was clearly correct in quashing the subpoena issued to Mr. Marro on the ground of irrelevancy and immateriality.

II. THE INFORMATION SOUGHT BY THE SUBPOENA IS PRIVILEGED UNDER THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

In numerous cases, the Supreme Court has emphasized the overwhelming importance of a free flow of information to the public. E.g., Buckley v. Valeo, 424 U.S. 1, 14-15 (1976); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Associated Press v. United States, 326 U.S. 1, 20 (1944). In this flow of

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6/ Id. (Finding of Fact 11). See also id. at 236.

7/ Id. (Finding of Fact 12).

8/ Id. at 235.

information, the role of the press is central:

> "The press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve." Mills v. Alabama, 384 U.S. 214, 219 (1966).

See also Grosjean v. United States, 297 U.S. 233, 250 (1936). Thus, the special protection which the First Amendment confers on the press is "not for the benefit of the press so much as for the benefit of all of us." Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

The basic free press guarantee is the right to publish and distribute information. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Marsh v. Alabama, 326 U.S. 501 (1946); Near v. Minnesota, 283 U.S. 697 (1931). This right, however, would be meaningless without constitutional protection for the process of gathering the information that is to be published and distributed.[9/]

In Branzburg v. Hayes, 408 U.S. 665, 681, 707 (1972), the Supreme Court expressly recognized that newsgathering by the press qualifies for First Amendment protection. The Court noted

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9/ The framers recognized the necessity to protect the gathering of news. James Madison wrote: "A popular government without popular information or the means of acquiring it is but a Prologue to a Farce or a Tragedy; or, perhaps, both." 9 Writings of James Madison 103 (Hunt ed. 1919).

that "without some protection for seeking out the news, freedom of the press would be eviscerated," 408 U.S. at 681, and emphasized that "news gathering is not without its First Amendment protections." 408 U.S. at 707. Cf. Pell v. Procunier, 417 U.S. 817, 833 (1974). Subsequent court decisions have interpreted Branzburg as establishing the principle that the gathering of news involves rights protected by the First Amendment. E.g., Baker v. F&F Investment, 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973); United States v. Liddy, 354 F. Supp. 208 (D.D.C. 1972); CBS, Inc. v. Young, 522 F.2d 234, 238 (6th Cir. 1975); In re The Washington Post Company, No. 76-1695 (4th Cir. July 19, 1976) (slip op.).[10/] See also Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972).

In Branzburg, the Court decided three cases, involving newsmen Branzburg, Pappas and Caldwell. In each case, the Court's specific holding was that the First Amendment did not afford the newsman a privilege not to testify before a grand jury concerning possibly criminal conduct which the newsman himself had observed. In the instant case, there is no suggestion that Mr. Marro has

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10/ Commentators have also read Branzburg as expressly recognizing a constitutional right to gather news. Significant Development, Constitutional Law -- Newsmen's Privilege, 53 B.U.L. Rev. 497, 500 (1973). The Supreme Court, 1971 Term, 86 Harv. L. Rev. 137 (1973); Comment, The Right of the Press to Gather Information After Branzburg and Pell, 124 U. Pa. L. Rev. 166 (1975).

observed any possibly criminal conduct. Moreover, the subpoena at issue does not seek from Mr. Marro any information concerning any conduct he observed. Rather, it seeks the identity of sources with whom he communicated. Thus, the specific holdings in Branzburg do not bear on the precise question now before this Court.

The vote in Branzburg was 5-4. Mr. Justice Powell, whose vote was crucial to the majority, also wrote a separate concurring opinion. He pointed out

> "that no harrassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with repect to criminal conduct. The balance of these constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions. 408 U.S. at 709-10.

Since Branzburg, numerous courts have applied this balancing test in both criminal and civil cases, and have rejected attempts to compel newsmen to reveal the identity of confidential sources. In State v. St. Peter, 315 A.2d 254, 256 (Vt. 1974), for example, the Supreme Court of Vermont held that a newsman is

entitled to withhold the identity of a source in a criminal case unless "there is no other adequately available source for the information and . . . it is relevant and material on the issue of guilt or innocence." Similarly, in Brown v. Commonwealth, 204 S.E. 2d 429 (Va. 1974), the Supreme Court of Virginia, in affirming a murder conviction, held that the trial court had not erred in refusing to require a newsman to divulge the identity of a confidential source of a published account of the crime. Such information was protected by the First Amendment, the Court concluded, unless it is not otherwise available and it is essential to a fair trial. For other cases sustaining newsmen's First Amendment claims of privilege, see Morgan v. Florida, 337 So.2d 951 (S. Ct. Fla., 1976) (reversing contempt conviction of reporter for refusal to answer grand jury questions); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972) (grand jury can override newsman's First Amendment rights only if the government's interest in investigation is "immediate, substantial, and subordinating;" there is a "substantial connection" between the information it seeks and the overriding governmental interest in the investigation; and the means of obtaining the information is not more drastic than necessary to forward the governmental interest); Baker v. F&F Investment, 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973) (affirming refusal to order disclosure of confidential source in civil rights case); Apicella v. McNeil Laboratories, 66 F.R.D. 78 (E.D.N.Y. 1975) (denying a

motion to compel a journalist to disclose confidential sources); Democratic Nat'l Committee v. McCord, In re Bernstein, 356 F. Supp. 1394 (D.D.C. 1973) (quashing subpoena to newsmen in Watergate civil case); Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1975) (newman's materials protected from compulsory disclosure in civil case); Gilbert v. Allied Chemical Corp., 411 F. Supp. 505 (E.D. Va. 1976) (quashing subpoena to broadcaster insofar as it sought the disclosure of confidential news sources). 11/

11/ Orsini cites four cases in which newsmen's claims of First Amendment privilege have been rejected. Farr v. Pritchess, 522 F.2d 464 (9th Cir. 1975); Lewis v. United States, 517 F.2d 236 (9th Cir. 1975); United States v. Liddy, 354 F. Supp. 208 (D.D.C. 1972); Rosato v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975). Each of these cases is clearly distinguishable. Neither Lewis nor Liddy involved a newsman's confidential sources. And the holdings in Farr and Rosato, which did involve confidential sources, were limited ones. In both cases, the newsman sought to withhold the names of court officers who had disobeyed a court order in a criminal case forbidding the disclosure of certain prejudicial information. The cases were thus similar to Branzburg, in which the reporters were witnesses to possibly criminal conduct. In both Farr and Rosato, the courts rejected the newsman's claim of privilege for the explicit reason that recognition of the privilege, under the circumstances, would have rendered the court powerless to enforce its orders directed to officers of the court. In each case, the holding was expressly limited to an attempt by a newsman to withhold the name of a source who was bound by the court's order. In Farr, the newsman had acknowledged that his sources were two attorneys bound by the court's order, and the court's holding was that the newsman "was not constitutionally protected in his refusal to identify those who violated the proper order of the court." 522 F.2d at 469. In Rosato, the court explicitly held that the newsman could not be required to reveal

(Footnote continued)

When the Branzburg balancing test is applied in this case, it is clear that Mr. Marro's interest in protecting the confidentiality of his sources far outweighs Orsini's tangential interest in obtaining disclosure. As this Court observed in Baker v. F&F Investment, 470 F.2d at 782, the newsman's interest in protecting the confidentiality of his news sources stems from

> "a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment, see e.g., New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis -- and the district court so found. The deterrent effect such disclosure is likely to have upon future "undercover" investigative reporting, the dividends of which are revealed in articles such as Balk's threatens freedom of the press and the public's need to be informed. It thereby undermines values which traditionally have been protected by federal courts applying federal public policy."

The force of these considerations was amply demonstrated in this case by the affidavits that accompanied the Motion to Quash. Mr. Marro's affidavit established that his capacity to

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(Footnote continued)

11/ any sources not bound by the court's order; he was only required to answer questions "directed toward affirmatively determining if the information did come from officers or attaches" of the court. 51 Cal. App. 3d at 226; 124 Cal. Rptr. at 450.

function as a journalist gathering information for dissemination to the public would be grievously impaired by violation of his promises of confidentiality. The news article in question concerned the conduct of government and the operation of our criminal justice system, matters of the utmost public importance.[12/] The subject matter of the article is highly sensitive, concerning as it does relations between the United States and foreign governments, and the mysterious international drug traffic and the efforts of DEA to combat it. Mr. Marro simply would not have been able to bring this highly important story to public attention if he had not been able to assure his sources of information that their identities would be kept secret. And he will not be able to gather similar news in the future if he is compelled to breach the promises he made to obtain this story. Marro Affidavit, ¶ 8.

Mr. Marro's explanation of the importance of confidentiality was buttressed in the District Court by affidavits of political scientist Richard Neustadt and of Jack Anderson, Clark Mollenhoff, Haynes Johnson and other newsmen. Professor Neustadt described the importance of confidential communications between public officials and newsmen for the effective and democratic

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12/ E.g., Garrison v. Louisiana, 379 U.S. 64, 74-74 (1964); Sheppard v. Maxwell, 384 U.S. 333, 349-50 (1966); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975).

functioning of government. The affidavits of newsmen described in detail specific instances in which confidential sources were absolutely critical to the gathering of news of substantial public importance.

In weighing this important constitutional interest in the flow of information to the public against the interest asserted by Orsini in discovering the sources of the statements quoted in the subpoena, it becomes apparent that Orsini's interest is virtually nonexistent. As has been demonstrated at pp. 6-11, supra, the information sought would not have assisted Orsini in proving that he was tortured, beaten, or otherwise ill-treated. Nor would it have enabled him to show that a bribe was paid to secure his return to the United States, or even that bribes have been paid in other cases involving Senegal. At most, it would have enabled him to present evidence that payments were made in the cases of unspecified men brought from unspecified countries to the United States for trial.

Thus, the information sought by Orsini did not bear on the central issue of this case -- his guilt or innocence. It did not bear on the elements of a claim under Toscanino. It did not even bear on a far-fetched theory that Orsini should be able to escape prosecution because the government paid a bribe to obtain custody of him. In the words of Mr. Justice Powell, the information bore "only a remote and tenuous relationship to the subject"

of the criminal case against Orsini.[13/]

Accordingly, the District Court properly concluded that, under the circumstances of this case, the First Amendment afforded Mr. Marro a privilege to protect the identity of his confidential news sources.

III. THE INFORMATION SOUGHT BY THE SUBPOENA IS PRIVILEGED AS A MATTER OF FEDERAL COMMON LAW

While the protection extended a newsman's confidential sources is well-grounded in the First Amendment, the First Amendment is not the only basis for that protection. Under Rule 1101 (b),(c) of the Federal Rules of Evidence, questions of privilege in federal criminal cases are to be decided in accordance with Rule 501 of those rules. Rule 501 provides that except as otherwise required by the Constitution or statutes of the United States, or in rules prescribed by the Supreme Court, such questions of privilege "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Putting constitutional considerations aside, then, the question of the newsman's privilege to protect his confidential sources is one of federal

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13/ By contrast, in Garland v. Torre, 259 F.2d 545, 550 (2d Cir. 1958), the information sought "went to the heart of the . . . claim."

common law, since there is at present no federal statute or rule governing the privilege.

This Court's decision in Baker v. F&F Investment, supra, illustrates the appropriate method of discerning the federal common law applicable to a claim of newsman's privilege. Although the Court ultimately based its decision squarely on the First Amendment, it did not confine its vision to First Amendment precedents. Both the District Court and this Court in that case looked to newsman's shield statutes in New York and Illinois "to inform [their] judgment concerning appropriate federal public policy" in the area. 470 F.2d at 781.[14/] These same statutes provide valuable guidance in determining the applicable principles of federal common law in this case.

The New York shield statute, New York Civil Rights Law § 79-H, as amended, is of particular interest in this case, since the information sought by the instant subpoena relates in part to newsgathering in New York. Affidavit of Marro. ¶¶ 3, 6. The New York statute provides in pertinent part:[15/]

14/ See also Ex parte Sparrow, 14 F.R.D. 351 (N.D. Ala. 1953), where the court looked to the law of the forum state on a question of newsman's privilege.

15/ Section 79-H was enacted by c.615 of the laws of 1970, and was amended by c.316 of the laws of 1975. The 1975 amendment added the words: "nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers."

> Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network, shall be adjudged in contempt by any court, the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network, by which he is professionally employed or otherwise associated in a news gathering capacity.

The New York Shield Law "affords [newsmen] the privilege of refusing to divulge the identity of any informant who has supplied them with information . . . ." People ex rel. Fischer v. Dan, 41 A.D.2d 687, 688 (4th Dep't 1973). In Wolf v. People, 69 Misc. 2d 256, 261 (N.Y. County), aff'd, 39 A.D. 2d 864 (1st Dep't 1972), the court laid down the following test for applicability of § 79-H:

> "[I]n order to raise successfully the claim of privilege, two essential elements must be established: First, the information or its sources must be imparted to the reporter under a cloak of confidentiality, i.e., upon an understanding, express or implied, that the information or its sources will not be disclosed; and second, that the information or its sources must be obtained in the course of gathering of news for publication."

That test was applied in quashing a subpoena issued to a newsman by the criminal defendant in People v. Marahan, 81 Misc. 2d 637 (Kings County 1975). See also People v. Bonnakemper, 74 Misc. 2d 696 (City Ct. of Rochester 1973) (subpoena issued to news organization by defendant in criminal case quashed under § 79-H); People v. Monroe, 82 Misc. 2d 850 (Bronx County 1975) (subpoenas issued to newsmen by defendant in criminal case quashed under § 79-H).

In the instant case, the conditions necessary for the application of § 79-H are all present. The subpoena seeks disclosure of the identity of the sources for two statements published in Newsweek.[16/] The Affidavit of Anthony Marro establishes that those sources are confidential sources in that they communicated with Mr. Marro after demanding and receiving from him an explicit promise that their identities would be kept confidential.[17/] The Affidavit further establishes that the identity of Mr. Marro's sources has been kept confidential.[18/]

16/ In contrast to People ex rel. Fischer v. Dan, 41 A.D. 2d 687 (4th Dep't 1973), the subpoena here does not seek testimony concerning a newsman's personal observation of criminal behavior.

17/ By contrast, in WBAI-FM v. Proskin, 42 A.D. 2d 5 (3d Dep't 1973), the communications between the source and the newsman were not confidential.

18/ By contrast, in People v. Wolf, 39 A.D. 2d 864 (1st Dep't 1972), the identity of the source was disclosed in the published article.

And it is beyond dispute that Mr. Marro communicated with his sources in the course of gathering news for publication.

The protection that § 79-H would extend to Mr. Marro's confidential sources under these circumstances is absolute; the strong public policy interests that are reflected in that statute are, at the very least, sufficient to warrant the recognition of a qualified privilege as a matter of federal common law. If, pursuant to the application of a qualified common law privilege, Mr. Marro's interest in protecting the confidentiality of his sources is balanced against Orsini's tangential interest in obtaining disclosure, Mr. Marro's interests must, for the reasons stated at pp. 17-20, supra, prevail.

Even without regard to the mandates of the First Amendment, then, the information sought by the subpoena in this case is privileged -- as a matter of federal common law.

CONCLUSION

For the foregoing reasons, the District Court was correct in quashing the subpoena issued to Mr. Marro.

Respectfully submitted,

John B. Kuhns
JOHN B. KUHNS

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Dated: April 14, 1977

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NEW YORK, NEW YORK 10004
425-1060

March 27, 1977

Kevin Baine, Esq.
Williams & Connelly
1000 Hill Building
Washington, D.C. 20006

Re: Dominique Orsini
Second Circuit Court of Appeals

Dear Mr. Baine:

Pursuant to our phone conversation this morning, I hereby consent to your filing an amicus curiae brief in the above matter pursuant to Rule 29 of the Rules of Appellate Procedure.

Very truly yours,

JURIS G. CEDERBAUMS

JGC:hc

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

BJF:AAS:cj
F.#763,779

United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

April 4, 1977

Kevin T. Baine, Esq.
Williams & Connolly, Esqs.
1000 Hill Building
Washington, D.C. 20006

Re: United States v. Dominique Orsini
Court of Appeals Docket No. 77-1019

Dear Mr. Baine:

This letter will confirm our telephone conversation of Friday, April 1, 1977. Please be advised that the United States has no objection to the filing of an amicus brief on behalf of Anthony Marro in the above-captioned case.

Thank you for your help, and please do not hesitate to contact me if I can be of any further assistance.

Very truly yours,

DAVID G. TRAGER
United States Attorney
Eastern District of New York

By: Alvin A. Schall
ALVIN A. SCHALL
Assistant U.S. Attorney
Deputy Chief, Appeals Division

cc: Gino E. Gallina, Esq.
30 Broad Street
New York, New York 10004
Attn: Juris Cederbaums, Esq.

AFFIDAVIT OF SERVICE

CITY OF WASHINGTON)
) ss.:
DISTRICT OF COLUMBIA)

KEVIN T. BAINE, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to this action.

2. On April 13, 1977, I served the Brief of Anthony Marro as Amicus Curiae by depositing copies thereof, first class postage prepaid, in the United States mails at Washington, D. C., addressed as follows:

Alvin A. Schall, Esquire
Assistant U.S. Attorney
Deputy Chief, Appeals Division
United States Department of Justice
Eastern District of New York
Federal Building
Brooklyn, New York 11201

Juris G. Cederbaums, Esquire
30 Broad Street
New York, New York 10004

Kevin T. Baine
Kevin T. Baine

Subscribed and sworn to before me this 13th day of April, 1977.

Myrtle D. Jones
Notary Public

My commission expires: 5/14/78